No. 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Petitioner,*

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Consent for the filing of this brief *Amicus Curiae* was granted by petitioner and respondents; stipulation of consent is being submitted simultaneously herewith.

The National Society of Professional Engineers, hereinafter referred to as the Society, is a non-profit membership corporation organized and existing under the laws of South Carolina, with headquarters maintained in Washington, D. C. It was founded in 1934 "as an educational institution [dedicated] to the promotion and the protection of the profession of engineering as a social and economic influence vital to the affairs of men and of the United States." (Extract from Constitution and Bylaws of the Society).

Membership in the Society is restricted to individuals who obtain and retain registration as a Professional Engineer or Engineer-in-Training under the engineering registration laws which are in force in all States, Territories, Possessions and the District of Columbia. The membership of the Society is approximately 46,000. Forty-six state societies of professional engineers are affiliated with the Society and within the state societies there are approximately 365 local chapters.

From its inception, the Society has interested itself in the effect of national laws on the engineering profession and in this connection it has taken a leading part in bringing to the attention of appropriate committees of Congress, from time to time, data bearing on the impact of federal legislation upon the engineering profession.

The principle in the case before this Court, which is a case of first impression, tests the question of whether employees of firms which render professional architectural-engineering services are subject to the provisions of the Fair Labor Standards Act, as amended. This question has been the subject of con-

flicting opinions in the lower federal courts. A substantial portion of the engineering profession, including many members of the Society, are anxiously awaiting a determination by this Court which will settle conclusively the present uncertainty regarding the relationship of the Fair Labor Standards Act to consulting engineering activities.

According to the National Council of State Boards of Engineering Examiners there are approximately 227,000 professional engineers registered today in the various states, who are licensed under state law to engage in consulting engineering practice. These engineers have an interest in the outcome of the pending case. Analyses by the Society of the occupational status of its members indicates that of the estimated 227,000 registered engineers, approximately 25,000 professional engineers are actually in private practice. They and their staffs of employees have a direct and immediate interest in the disposition of this litigation.

With the sincere expectation of a ruling by this Court that the offer and performance of a professional service cannot be viewed as the type of ordinary business and commercial operation Congress intended to bring under regulation through the Fair Labor Standards Act, as amended, this brief is respectfully submitted.

QUESTION PRESENTED

In the opinion of the *Amicus Curiae* the question presented to this Court by the petitioner is stated in terms too narrow and restricted for a proper decision going to the heart of the issue before this tribunal. We submit that the issue here, in essence, is whether employees of a consulting professional firm which renders a service primarily intellectual, creative, non-

standardized and unique in nature, requiring advanced knowledge and training in a professional field, are subject to the Fair Labor Standards Act, as amended, in the same classification as employees of business and commercial enterprises.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) involved here are Sections 3(b), (i), and (j), as follows:

> Sec. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—
>
> * * * * * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation, directly essential to the production thereof, in any State.

SUMMARY OF ARGUMENT

I

A. Plans and specifications prepared by employees of a consulting architectural-engineering firm constitute a physical reproduction of intangible professional advice and conclusions, and as such do not partake of the character of "goods" within the meaning of that term in the Fair Labor Standards Act. The distinction between commercial goods and the embodiment of creative ideas in tangible form for the exclusive use of a client has been recognized consistently in a series of court decisions, each of which is consistent in principle with the ruling of the court below. (*McComb* v. *Turpin*, 81 F. Supp. 86 (D.C. Md. 1948); *Washington Times Herald Inc.* v. *District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954); *Bozant* v. *Bank of New York*, 156 F.2d 787 (2d Cir. 1946)).

This judicially accepted distinction between "goods" for commerce and items such as plans and specifications manifesting a professional service, is not contrary to the position of this Court in *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490 (1945). To Western Union, the permanent message which it produces is the embodiment of another's mental processes; it is a unit of work and the end product which the entire organization of Western Union is designed to produce. Plans and specifications, on the other hand, represent the ideas and advice of the consulting firm; they are prepared for the particular, personal and exclusive use of specific clients, and thus cannot be considered as articles of commerce in the generally accepted meaning of that term. Nor can plans and specifications be compared to munitions of war which this Court found to be "goods" in *Powell* v. *United States Cartridge*

Co., 339 U.S. 497 (1950). Though prepared for the ultimate consumer, munitions of war can be used for a variety of purposes by varying numbers of persons or groups, and are properly embraced within the word "products" found in the definition of "goods" in Section 3(i). Plans and specifications, however, are prepared to meet the needs of a particular client which he may subsequently use, revise or discard, and as such cannot be considered "products" of commerce.

Petitioner avers that that plans and specifications prepared by a consulting engineer for use in the improvement of an interstate highway cannot be distinguished from concrete road materials prepared for the same purpose. Here again petitioner has failed to distinguish between items which represent the embodiment of professional judgment and determinations and end products of a manufacturing process. Plans and drawings prepared by a consulting engineering firm stand in no different light than deeds or contracts prepared by a law firm in connection with the construction of an interstate highway. Both are the product of professional ability and judgment; neither can be considered in the same category as construction materials actually incorporated into the physical highway itself.

B. The preparation of plans and specifications by employees of a consulting engineering firm does not meet the "closely related and directly essential" coverage test established in the 1949 amendments to the Fair Labor Standards Act. Even under the more liberal "necessary" test, in effect prior to 1949, employees of a consulting engineering firm under circumstances practically identical to those in the instant case were held not to have the required close

and immediate tie with the process of production so as to be covered by the Act. (*McComb* v. *Turpin*, *supra*).

Coverage under the amended language is predicated upon the employee's activity being both "closely related" *and* "directly essential" to the production of goods for interstate commerce. An important characteristic of consulting engineering destroys the validity of any argument that employees of such firms are engaged in activities "directly related" to the production of goods. That essential factor, assumed to the contrary by petitioner, is that the work performed by a consulting engineering firm is not in every instance intended or followed by the actual construction of a project. Aside from situations wherein the proposed project is delayed or abandoned by the client, a good deal of the time and effort of many consulting firms is taken up by the preparation of traffic surveys, feasability studies, economic cost data reports and other plans purely of a preliminary nature. At other times, long-range studies complete with detailed plans and specifications are undertaken with the knowledge that such information is to be used solely for advance planning purposes. It is this factor which differentiates employees of a consulting engineering firm from draftsmen and fieldmen employed by construction contractors (whose work is always related to definite construction projects), and destroys an attempted analogy between them.

Congress, in the 1949 amendments to the Act, indicated a clear and positive intent to exclude from coverage those activities which were too far removed from production, *i.e.*, activities that are essentially local in character. Read in its entirety, the State-

ment of the Managers on the Part of the House (Report No. 1453, 81st Cong.) indicates that the test for coverage is not whether the employer operates in one state or more than one state, but whether the employees' work is "closely related and directly essential to the production of goods for commerce." We submit that employees of local consulting architectural-engineering firms fail to meet this test for coverage. We further believe that the practice of engineering, like the practice of law, medicine, accounting or any of the other learned professions, is essentially a local activity, of the type which Congress *expressly* excluded from the coverage of the Act as not being "closely related or directly essential" to the production of goods.

II

A. The generally accepted test for determining whether or not employees are engaged "in commerce" within the meaning of the Act was first stated in *McLeod* v. *Threlkeld,* 319 U.S. 491 (1943). As enunciated therein by this Court, the test to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, "but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." Applying this test to respondents' employees, it can be seen that the preparation of plans, drawings and specifications is not so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to "be a part of it." Rather, the only connection between employees of professional consulting engineers and interstate commerce is to "support" those who actually are engaged in interstate commerce, such as construction contractor, their employees and suppliers of material.

Cases on which petitioner relies to substantiate its assertion that respondents' "off-the-road, white-collar" employees are engaged in commerce are not authority for the instant situation. While "off-the-road" and "white-collar" employees of construction contractors can logically be held to be "in commerce" due to their close and immediate tie with their employer's activities, the same conclusion cannot be reached with respect to draftsmen and clerical employees of consulting engineers who, unlike firms engaged in actual construction, are not "so closely related to interstate commerce as to be a part of it."

Petitioner relies heavily on *Mitchell* v. *Brown Engineering Co.*, 224 F.2d 359 (8th Cir. 1955), *cert. denied*, 350 U.S. 875 (1955) to support its contention that respondents' employees are engaged in commerce and thus covered by the Act. While the Eighth Circuit in the *Brown* case concluded that employees of a consulting engineering firm were engaged "in commerce," such conclusion was influenced to a large extent, if not completely, upon the fact that Brown provided a resident engineer at the job site. Actually, however, the resident engineer was only the agent of the consulting firm and did not have the authority to control the construction; but rather, his function was to advise the consulting firm of progress, deviations and other factors relating the construction to the engineering design. In any event, this factor is not present in the instant case.

In our opinion the Eighth Circuit misapplied the "in commerce" test in holding that professional engineering services for completely local projects should be considered a link in the chain leading to interstate commerce transactions, and thus equate completely

local professional services to eventual "in commerce" results. We thought Congress had made it clear in the 1949 amendments to the Act that remote and drawn-out relationships to interstate commerce would no longer be permitted as a basis for sweeping local activity under the Act.

Where draftsmen and clerical employees are engaged in activities related to the construction efforts of third parties, rather than their immediate employer, as is true in situations involving employees of consultants, the courts have been consistent in holding that such work is not sufficiently closely related to interstate commerce so as to bring such employees within the Act's coverage. (*Kelly* v. *Ford, Bacon & Davis, Inc.*, 162 F.2d 555 (3rd Cir. 1947); *Collins* v. *Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229 (D.C. Pa. 1946)). And when plans and specifications are silent regarding source of supply of required materials for construction, leaving this determination to the individual contractor or subcontractor, which is the usual procedure for consulting firms, the employees who prepare such plans do not have that degree of close relationship to the movement of goods in interstate commerce which would justify their being included within the provisions of the Act. (*Laudadio* v. *White Construction Co.*, 163 F.2d 383 (2d Cir. 1947)).

B. The interstate travel and communications of respondents' employees does not constitute an engagement in commerce within the meaning of the Act since, as the court below correctly stated, "there must be some relation to a business which is interstate in character". (App. A., p. 40). Petitioner's reliance on *United States* v. *Shubert*, 348 U.S. 222 (1955) and *United States* v. *International Boxing Club of New York*,

348 U.S. 236 (1955) to support its contention that the interstate activities of a consulting engineering firm (like the promotion of theatrical or boxing exhibitions) constitute trade or commerce, is misplaced. Such a broad extension of "trade or commerce" is untenable with respect to the independent practice of the professions (*The Schooner Nymph*, 18 Fed. Cas. 506 (1834)).

More in point, because of a similarity between the type of specialized services offered to specific clients, is *Mitchell* v. *Krout & Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957) where the court held that employees of an investigative agency who conduct local investigations pursuant to contracts between the agency and its clients are not engaged in commerce within the meaning of the Act. Their work, like that of respondents' employees, is essentially local in character. It is important to note that the court in *Krout & Schneider* considered as irrelevant the fact that some of the investigations were conducted by out-of-state branches of the agency or that the agency's own offices, being located in different states, transmit inter-office correspondence across state lines.

Furthermore, the interstate travel of respondents' fieldmen does not constitute an engagement in commerce, for such activity is merely incidental to their primary duty to gather data for incorporation into the plans and specifications which represent the exercise of professional judgment. Such activity is no different from that of employees of leading law firms who travel across state lines to perform research, interview witnesses, check records, etc., in order to gather basic information which forms the basis for the lawyer's future strategy and courses of action.

ARGUMENT

I

THE PREPARATION OF PLANS, SPECIFICATIONS AND DRAWINGS BY EMPLOYEES OF PROFESSIONAL CONSULTING ARCHITECTURAL-ENGINEERING FIRMS DOES NOT CONSTITUTE THE "PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING AND CONTEMPLATION OF THE FAIR LABOR STANDARDS ACT.

A. Plans and specifications are a tangible reproduction of intangible professional advice and conclusions, and as such do not partake of the character of "goods" within the meaning of the statutory term.

Petitioner seeks to establish the premise that plans, specifications and drawings, as evidence of professional advice or conclusions, are "goods" within the meaning of the Act by reference to a series of cases from which it is sought to derive *inferentially* that such items are to be considered in the same light as articles ordinarily sold to the public as "subjects of commerce." Petitioner, however, cites no case in which it has definitely been established that the embodiment of creative ideas in tangible form for the exclusive use of a client or specific class of clients are "goods" as defined in the Act.

On the other hand, several courts have expressly stated that the preparation of plans, specifications, or the embodiment of any specialized advice or opinion in tangible form to meet the needs of specific clients are *not* to be considered as coming within the established definition.

The very question before this Court, whether plans and specifications prepared by a consulting engineering firm are "goods," was considered in *McComb* v. *Turpin,* 81 F. Supp. 86 (D.C. Md. 1948) where the court there stated:

> I do not think even this broad literal definition [goods] could fairly be construed to apply to the plans, drawings and specifications prepared by or under the supervision of the defendants or their employees. They are only a physical embodiment in words of professional conclusions.
>
> * * * * * * * * * *
>
> Certainly the word 'goods' could not be construed to include professional advices and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given. These plans, drawings and specifications are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. They are, of course, quite unlike stocks, bonds and commercial paper which are themselves instrumentalities of commerce.

Judge Chesnut in the *Turpin* case, cites *Bozant* v. *Bank of New York,* 156 F.2d 787 (2d Cir. 1946) as clearly setting forth this important distinction. In the *Bozant* case it was stated at p. 787:

> Some of the activities which went on, we agree, should on no theory be counted. A lawyer who in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within s. 203(j); and the same is true of the correspondence of a broker and of a banker. The definition of 'goods' in s. 203(j) might literally go so far even as that; but it would be unreasonable to the last degree to suppose that Congress meant to cover such incidents of a business whose purpose did not comprise the production of 'goods' at all.

The reference by Judge Chesnut to the important distinction between articles produced for the consuming public, where the price paid covers the commercial value of the product itself as established in a competitive economy, and items such as plans, deeds or contracts, prepared for the use of a particular client or customer, where the price or fee received is compensation primarily for the advice or service and the mechanical expression of such creativeness is merely incidental, has been clearly stated in *Washington Times Herald Inc.* v. *District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954). There the District of Columbia sought to levy a retail use tax on the purchase by a newspaper of mats bearing impressions of comic strips which were used in the first of a series of operations culminating in the production of a metal plate from which the comic page is printed. The sums paid by the newspaper for the comic strip mats greatly exceeded the price of blank mats.

Concluding that such transactions were within the exemption from sales and use taxes granted professional or personal service transactions, the Court of Appeals clearly pointed out that sales to the newspaper of comic strip mats with the right to reproduce them one time, were sales of professional and personal services of the artists which involved transfer of title to the mats, of inconsequential value, from which the drawings could be reproduced. It was further held that the price was paid for the artists' work, not for the mats themselves, and that the newspaper bought the creation of the artist and the right to reproduce it—not the material on which it was impressed.

There are other cases applying this same principle of distinction.[1] Under varying circumstances, all are evidence of the very real and recognized principle which differentiates commercial products in the generally accepted sense of the word from tangible items representing professional services, advice and conclusions, or artistic creativeness.

We submit that the judicially accepted distinction between products of trade and tangible manifestations of intangible advice or services precludes the contention that plans, specifications and drawings of a consulting engineer constitute "goods" within the meaning of Section 3(i), or that the work of preparing or assembling them amounts to the "production of goods for commerce."

Petitioner, however, has urged upon this Court (Brief, p. 42) that the accepted conclusion that plans and specifications are not "goods" is difficult to reconcile with *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490 (1945). Apparently a similar contention was made unsuccessfully ten years ago in *McComb* v. *Turpin, supra,* where the court clearly differentiated telegraphic messages from plans and specifications prepared by a consulting engineer:

> In *Western Union vs. Lenroot,* 323 U.S. 490, 502, it was held that telegrams were goods within the definition of the Act because they were 'sub-

[1] See, for example, *Callus* v. *10 East 40th Street Building*, 146 F. 2d 438 (2d Cir. 1944), *reversed on other grounds*, 325 U.S. 578 (1945); *Collins* v. *Ford, Bacon & Davis*, 71 F. Supp. 229 (D.C. Pa. 1946); *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2d Cir. 1948); *Mitchell* v. *Krout and Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957); and *Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667 (3d Cir. 1953).

jects of commerce.' But that case does not apply here because the facts show that the plans and specifications are not sold or otherwise dealt in as 'subjects of commerce.' That case is inapplicable here for the further reason that the Court's holding that telegrams were goods was obviously and properly based on the relationship of the message to Western Union; and in that view, considering the function of Western Union, a message is a unit of work, rather than an idea. Certainly as to the author of the message, it is an idea or advice and not goods or a unit of work. Similarly, an artistic or literary contribution to a newspaper is certainly not goods insofar as the author is concerned, but it is clear that insofar as the publisher of the newspaper is concerned the newspaper is goods within the meaning of the Act.

We believe that this statement from the *Turpin* decision completely answers petitioner's claim in the instant case. As far as Western Union is concerned, it is not the author or creator of the telegrams which it dispatches and delivers across state lines. The permanent message which it produces is the embodiment of another's mental processes; Western Union merely reduces such ideas to tangible form and utilizes its facilities and personnel to transmit the message to its required destination. To the telegraph company, impersonal printed messages are the end products which its entire organization is designed to produce, and as such are "goods" produced by that company for interstate commerce. "Based on the relationship of the message to Western Union" telegrams cannot be considered for these purposes in the identical vein as plans or specifications created by consulting engineers for the particular, personal and exclusive use of clients.

Reference is made (Petitioner's brief, p. 6, 24) to "voluminous" and "bulky" plans and specifications prepared by consulting engineers in an obvious attempt to infer that these physical items are therefore "goods" and "subjects of commerce." It is true that in certain instances, highly complex and difficult projects require "voluminous" plans, drawings and detailed specifications. We also know that in many situations, where the problems encountered on a particular case are involved or confused, a lawyer's briefs, memoranda and correspondence become "voluminous" and sometimes "bulky." Is it not illogical to therefore conclude, as petitioner would have us do, that because the lawyer prepares "voluminous" and "bulky" material, he is engaged in the production of "goods" or "subjects of commerce" within the meaning of the statutory term?

We think so, and by the same token it is illogical to infer such a conclusion regarding the professional work of an engineering consultant. The bulk, or lack of bulk, of documents prepared by a consulting engineering firm are relevant only to the specific project for which they are prepared. Their size or quantity are not indicative of whether or not they can be classified as "goods" or "subjects of commerce."

Petitioner further declares (Brief, p. 46) that this Court's decision in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497 (1950), supports the contention that plans and specifications, like munitions of war, are also "goods" in the sense of that word as defined in the Act. While the *Powell* decision did indicate that "goods" are not necessarily limited to those produced for sale or exchange, that decision in no way can be extended on that account to include plans or specifica-

tions. It is important to note that this Court found munitions to be "goods," even though, like plans or specifications, prepared for the ultimate consumer, because munitions are obviously embraced within the word "products" found in the definition of "goods" in Section 3(i). We would be closing our eyes to reality, however, were we to consider plans and specifications prepared by a consulting engineer as "products" in the generally accepted sense of the meaning of that word. Even though not bought and sold by the public generally, munitions of war are properly classified as "products" inasmuch as they can be used for a variety of purposes and by varying numbers of persons or groups. Plans and drawings prepared by a consulting engineer, on the other hand, are prepared to meet the needs of a particular client which he may subsequently use, revise or discard, and as such cannot be considered "products" of commerce.

Alstate Construction Co. v. *Durkin*, 345 U.S. 13 (1953) and *Thomas* v. *Hempt Bros.*, 345 U.S. 19 (1953), are urged by petitioner as authority for the proposition that plans and specifications prepared by a consulting engineer for use in the improvement of an interstate highway cannot be distinguished from the preparation of concrete road materials for the same purpose. Petitioner, however, fails to discern the major differentiating factor which has been alluded to earlier: that plans and drawings prepared by a consultant, including the instructions and specifications for the supplies and materials to be used in the construction process, are the embodiment of professional judgment and determinations; whereas the concrete road material is the end product of a manufacturing process. If petitioner's contention has merit, deeds and contracts

prepared by a law firm as necessary elements for the construction of an interstate highway could also be likened to the concrete road materials. Such a conclusion certainly is unreasonable. Plans and drawings prepared by a professional consulting engineering firm stand in no different light or relationship to the highway than the lawyer's deeds or contract forms. Both are the product of professional ability and judgment. Neither can be considered in the same category as construction materials actually incorporated into the physical highway itself.

The fact that plans and specifications prepared by a professional consulting firm include in detail all of the data, information and instructions necessary to adequately guide the client and his contractors, and that such plans involve the assembling of estimates, measurements, field data and other information, does not detract from their status as indicia of professional advice and judgment, and thus permit of their classification as "goods" as defined in the Act. The distinction is as ancient as the sixteenth century, as W. Somerset Maugham relates is his essay, "El Greco":[1]

> When the authorities taxed him upon the profits of his work at Illescas he [El Greco] fought them and got judgment in his favour. So far as I can understand the argument his contention was that what he sold was not canvas and paint, but the art with which he had arranged the paint, and this was not dutiable.

The consulting firm, like El Greco, does not sell plans, specifications and drawings (canvas and paint), but the professional skill and ability (art) with which

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[1] "Mr. Maugham Himself," Doubleday and Co., Inc., 1954, Page 525, Essay "El Greco."

are arranged the estimates, measurements and other data (paint) into a finished set of plans or designs for the use of a client.[8]

B. *The preparation of plans and specifications by employees of a consulting engineering firm does not constitute a "closely related process or occupation directly essential to the production" of goods for commerce.*

The "closely related" and "directly essential" criteria for determining whether employees are engaged in the production of goods for commerce were adopted in the 1949 amendments to the Fair Labor standards Act. Prior to the changes made in 1949, employees were deemed to be engaged in the production of goods for commerce if they were employed in any process or occupation "necessary" to the production of such goods. The Labor Department's Interpretative Bulletin, Section 776.17(a), General (May, 1950) states that:

> The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to *narrow,* and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the Act formerly depended on whether their work was "necessary" to the production of goods for commerce. (emphasis added)

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[8] See *Bozant* v. *Bank of New York,* 156 F. 2d 787 (2d Cir. 1946) at 790 where the court clearly pointed out the basic distinction between "the mere writing of letters or the drawing of papers, which have no value of their own except as records," and notes, stocks, bonds, bills of exchange and other negotiable paper which themselves have inherent commercial value.

Even under the admittedly more liberal "necessary" test, employees of a consulting engineering firm under circumstances practically identical to those in the instant case were held not to have the required close and immediate tie with the process of production so as to be covered by the Act. Referring once again to Judge Chesnut's able opinion in *McComb* v. *Turpin, supra*, we find the following discussion, based, to a large extent, on Justice Frankfurter's statement in *10 East 40th Street* v. *Callus*, 325 U.S. 578 (1945), that "remoteness of a particular occupation from the physical process is a relevant factor in drawing the line" between coverage and non-coverage:

> In following this approach to the question we find in this case that the work of the employees does not have this required close and immediate tie with the production of goods. Their work is highly local in character * * * far removed in space from the projects to which their work relates. It is even more remote in its causal relation to the production of goods. Goods intended for interstate commerce can only be produced either manually or mechanically. These employees in no way touch goods so to be produced. Their work relates only to the preparation of plans and specifications for a building or other construction work. The building or structure so planned for may or may not thereafter be built. If built, it may or may not be used for the production of goods for interstate commerce. If used for the production of such goods the buildings themselves are merely housing for manual and/or mechanical work by which the goods are produced. To the extent that machinery or other processes of manufacture are used, these employees have no part whatever therein. Men and machines are doubtless necessary to the production of goods in a factory and the factory building is doubtless necessary to house the men or machines and the plans may be neces-

sary for the construction or alteration of the building, the activities of the employees in preparing the plans may be said to be necessary to the comprehension of the architectural or engineering advice; but it seems clear that the employees' activities are only very remotely related to the production of goods.

The "closely related" and "directly essential" tests for coverage under the Act are not mutually exclusive. As stated in Section 776.17(a) of the Labor Department's Interpretative Bulletin, "Under the amended language, an employee is covered if the process or occupation in which he is employed is *both* 'closely related' *and* 'directly essential' to the production of goods for interstate or foreign commerce." Thus, aside from the question of being "directly essential" it is imperative that employee activities also be "closely related" to the production of goods for commerce in order for such employees to be covered. Petitioner, however, has consistently overlooked one important facet in the nature of consulting engineering which destroys the validity of any argument that employees of consulting engineering firms are engaged in activities "directly related" to the production of goods. That factor, mentioned by Judge Chesnut in the *Turpin* case, *supra*, is that the work performed by a consulting engineer is not in every instance immediately followed by the actual construction of the designed project. In instances, construction of the proposed project is delayed or abandoned altogether by the client.[4]

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[4] The recent extended controversy over construction of an additional span across the Potomac River is a perfect example of what can happen when a "client" changes his mind about a proposed project. In 1954 Congress authorized the construction of a bridge across the Potomac in the vicinity of Constitution Avenue (P.L. 704, 83d Cong., 2d Sess., 68 Stat. 961). Based on that authorization

Petitioner, erroneously assuming that actual construction always follows on the heels of the preparation of plans and drawings, is also apparently unaware that a good deal of the time and effort of many consulting firms is taken up, for example, by the preparation of traffic surveys, feasability studies, economic cost data reports and other plans purely of a preliminary nature. Often, consulting engineers undertake long-range studies complete with detailed plans and specifications with the knowledge that such information is to be used solely for advance planning purposes, and that the contemplated projects possibly will never materialize, or will be materially altered necessitating revised plans and specifications.[8] For example, among

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approximately $250,000 had been obligated for detailed designs, specifications and other preliminary work at the proposed site. Then, in 1958, at the request of President Eisenhower and Interior Secretary Seaton, Congress amended the 1954 act to provide for a shifting of the proposed bridge approximately 800 feet upstream (P.L. 446, 85th Cong., 2d Sess., 72 Stat. 180). District Highway officials have indicated that the change in location will mean a substantial delay in construction because new plans and working drawings will have to be made and approved by Federal agencies.

[8] That this possibility is not remote is evidenced by two examples of actual cases taken from the files of the Public Health Service in connection with the Construction Grants Program administered under the Water Pollution Control Act (P.L. 660, 84th Cong., 2d Sess., 70 Stat. 498, 502). In one case a new primary sewage treatment plant, with related facilities, was authorized for a village in New York State. Final plans were approved by the Public Health Service, and the Village was told to go ahead with the advertising for construction bids. The voters, however, rejected a bond issue to finance the construction, and the entire project was withdrawn.

In another instance, final plans were approved by the Public Health Service for rehabilitation of an existing sewage treatment plant in Wilmington, Delaware. The community, however, decided to dismiss the consulting engineer and have the proposed works redesigned. A new engineer was engaged, new plans were prepared, contracts were awarded and the project is now under construction.

the respondents' projects for improvement, repair or enlargement of interstate instrumentalities or facilities, which petitioner has listed in Appendix B, p. 45, 46, are: advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a) and making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a).

Congress itself has recognized the value of engineering studies, plans, surveys and drawings for advance planning purposes, under circumstances in which actual construction of the proposed projects is not *necessarily* immediately contemplated or may never be executed, by providing interest free loans to local communities for the advance planning of various types of public works projects.* Planning advances are generally made for preliminary and basic planning which is conducted prior to the time that a final determination is made to proceed with financing and construction.

Thus any attempt to draw an analogy between draftsmen and fieldmen employed by construction contractors, whose work is always related to definite construction projects, and employees of professional con-

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* Initiated by section 702 of the Housing Act of 1954 (P.L. 560, 83d Cong., 2d Sess., 68 Stat. 590 *et seq.*), and expanded later in the Housing amendments of 1955, the Federal Advance Planning Program now authorizes a $48 million revolving loan fund for the planning of needed public works. Funds for advance planning cover the cost of engineering and architectural surveys, designs, plans, estimates, working drawings, specifications and other data preliminary to construction.

sulting engineers is totally without merit or foundation. Draftsmen employees and clerical workers were properly held covered by the Act in *Laudadio* v. *White Construction Co.*, 163 F.2d 383 (2d Cir. 1947) and *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F.2d 334 (9th Cir. 1946) since their work of preparing plans and drawings was "closely related" to the production of goods for commerce or interstate commerce itself. Draftsmen, fieldmen or clerical employees of consulting engineers, however, whose employment cannot be considered "closely related" to the production of goods for commerce, as can employees of construction contractors, are not properly embraced within the umbrella of coverage on this account.

Untenable also, is the contention that employees of consulting engineers always perform work, the nature of which is "directly essential" to the production of goods for commerce. Though unlikely, it is possible to construct a road or building without detailed engineering plans and specifications. In any event, as was stated in *10 East 40th Street* v. *Callus, supra,* "merely because an occupation is indispensable in the sense of being included in the long line of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act." [Citing cases].

In substituting the "closely related" and "directly essential" tests for the former "necessary" test, Congress, in the 1949 amendments to the Act, indicated a clear and positive intent to exclude from coverage those activities which were too far removed from production, *i.e.*, activities that are essentially local in character. In connection with the 1949 amendments, the House Conferees in Report No. 1453, 81st Cong. pp. 14-15,

cited "some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production." Example 5 reads:

> 5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

The above-quoted exclusion, adopted by the Labor Department in its Interpretative Bulletin (Sec. 776.19 (b)(2)), clearly applies to the respondent firm in the instant case, contentions of the petitioner notwithstanding. Petitioner relies on the alleged "interstate character" of the consulting firm to substantiate its claim that the firm's business is not essentially "local," and therefore not embraced within the express Congressional exclusion.

The petitioner misreads the intent of Congress in enacting the 1949 amendments to the Act, as related to the instant problem, and particularly as illustrated by the six examples of employees engaged in local activities who would no longer be considered within the Act's coverage. Read in its entirety, the Statement of the Managers on the Part of the House is clear that the purpose was to prevent the extension of coverage to employees of employers in local activity, in general. Thus, it is noted that ". . . an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc. activity than was true in the above-cited cases." These cases pertained to employees of local merchants,

(*McComb* v. *Deibert*, (D.C. Pa. 1949)), employees engaged in maintaining and repairing private homes and dwellings and employees of a restaurant located in a factory (*McComb* v. *Factory Stores*, 81 F. Supp. 403 (D.C. Ohio 1948)).

The House report further noted that the amendments, on the other hand, would not remove from coverage employees of an independent employer performing work on behalf of a manufacturer, mining company, *or other producer for commerce.* If the consulting engineer is not a producer for commerce, as we contend, his employees are within the first category of the discussion, *i.e.*, employees engaged in non-covered local activity whose work is not so closely related and directly essential to the production of goods for commerce. The test is not whether the employer operates in one state or more than one state, for the report points out that under the 1949 amendments "employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing or mining goods for commerce, will remain subject to the Act."

Read in the light of the full discussion and explanation by the House Managers, the *examples* of corrective legislative action to prevent further improper extension of coverage refer back to the basic question of the employees' work being "closely related and directly essential to the production of goods for commerce."

As this Court said in *10 East 40th Street* v. *Callus*, *supra*, "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. We must be alert, therefore, not to absorb by adjudication

essentially local activities that Congress did not see fit to take over by legislation." We submit that the practice of engineering, like the practice of law, accounting, medicine or any of the other learned professions, is "essentially" a local activity, of the type which Congress *expressly* excluded from the coverage of the Act as not being closely related or directly essential to the production of goods.

Petitioner, however, places great emphasis upon respondents' limited multi-state activities in an effort to include their employees under the coverage of the Act. This strategy flies in the face of the well-established rule, stressed by the petitioner, that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business." *Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1943).

A close examination of Example 5 from House Conference Report No. 1453, *supra*, indicates a Congressional intent to exclude from coverage "employees of a local architectural firm whose activities *include* the preparation of plans for the alteration of buildings within the State * * *." (Emphasis added). The language does not apply the exclusion to local architectural firms whose activities "are limited" to the preparation of plans for the alteration of buildings within the State. Thus, we see clearly that Congress intended to remove from coverage architectural firms whose activities are "essentially" local, but which may nevertheless engage from time to time in out-of-state projects as required by their various clients and the scope of their practice. There is no evidence of Congressional intent to limit the exclusion to architectural-engineering practices conducted exclusively within the confines of a single state, as petitioner infers.

Nor, do we assume that by its *example* of an architectural practice, the Congressional intent can be read not to refer equally to engineering or other professional practice. In practice, it would be difficult, if not impossible, to draw a sharp distinction between architectural and engineering practice. The respondent firm is engaged in both professions, and this is a common and growing pattern of joint and overlapping interests in the design professions.

II

THE VARIOUS ACTIVITIES OF EMPLOYEES OF PROFESSIONAL CONSULTING ARCHITECTURAL-ENGINEERING FIRMS DO NOT AMOUNT TO AN "ENGAGEMENT IN COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

A. *The preparation of plans, drawings and specifications and the miscellaneous clerical work of respondents' employees is not so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to bring them within the "in-commerce" coverage of the Act.*

An accurate yardstick for determining whether or not employees are engaged "in commerce" within the meaning of the Fair Labor Standards Act was first stated in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), and has been quoted approvingly ever since. As this Court declared in that case:

> The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.

Applying the *Threlkeld* test, the Fifth Circuit in *Billeaudeau* v. *Temple Associates*, 213 F.2d 707 (5th

Cir. 1954), concluded that a watchman on a housing construction project who actually received lumber and invoices, and at times guarded employees unloading lumber, was not so closely related to the movement of interstate commerce as to be a part of it. "The effect, if any, such employees have on interstate commerce is, in our opinion, miniscule." If a watchman who actually receives and handles items of interstate commerce or closely supervises those who do handle it at the actual job site can be held by the Fifth Circuit not to be engaged in interstate commerce, we fail to see how draftsmen and clerical employees of a consulting engineer, further removed from interstate commerce than the watchman, can be held to be so "closely related to the movement of the commerce as to be a part of it."

"Closeness" under the *Threlkeld* test "depends upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce" (*Walling* v. *Consumers Co.*, 149 F.2d 626 at 629 (7th Cir. 1945)); and accordingly, Congress did not intend to bring within the Act on the basis of engagement in commerce every person whose labor is of some use or convenience, "or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged." (*Johnson* v. *Dallas Downtown Development Co.*, 132 F.2d 287 (5th Cir. 1942)).

We submit that while the activities of employees of consulting engineering firms are useful, essential and convenient, such activities do not bear the close relationship to the movement of goods in interstate commerce, or interstate commerce itself, so as to be classified a part of such interstate commerce. In our

opinion, the relationship of employees of consulting engineers to the "in commerce" criteria for coverage is "miniscule."

As Justice Douglas clearly stated in his dissenting opinion in *Alstate Construction Co.* v. *Durkin, supra:*

> A person who is maintaining or repairing interstate transportation facilities is 'engaged in commerce.' (Citing cases) A person who is creating articles destined for the channels of interstate commerce and all others who have such a close and immediate connection with the process as to be an essential or necessary part of it are engaged in 'the production of goods for commerce.' (Citing cases) If those who serve those 'engaged in commerce' are also included, a large measure of cases affecting commerce are brought into the Act. Yet the history of the Act shows that no such extension of the federal domain was intended. (Citing cases) If those whose activities are necessary or essential to support those who are 'engaged in commerce' are to be brought under the Act, I think an amendment of the Act would be necessary.

The only connection between employees of professional consulting engineers and interstate commerce is to "support" those who are actually engaged in interstate commerce (construction contractors, their employees and suppliers of material), and as such the employees of consulting firms cannot thereby be held to be so closely related to interstate commerce as to be a part of it.

Petitioner relies heavily on a series of cases in which it is alleged the courts have rejected the distinction between so-called "white collar" workers and manual laborers, and between "on-the-road" and "off-the-road" workers, and which therefore permit the con-

clusion that employees of consulting engineering firms, in their capacity as "off-the-road, white-collar" workers, are engaged in commerce to the same degree and extent as "manual, on-the-road" employees. This assumption by petitioner is misplaced, however, since the cases upon which petitioner relies are easily distinguishable from the instant situation. *Laudadio* v. *White Construction Co., supra,* and *Ritch* v. *Puget Sound Bridge and Dredging Co., supra,* held that the Act applied to draftsmen and clerical employees of *construction contractors* engaged in runway extension and channel dredging where the construction of such projects is judicially well-settled as being "in commerce." While "white-collar" employees of construction contractors can logically be held to be "in commerce" due to their close and immediate tie with their employer's activities, the same conclusion cannot be reached with respect to draftsmen and clerical employees of consulting engineers who, unlike firms engaged in actual construction, are not "so closely related to interstate commerce as to be a part of it." By stating that the projects in the *Ritch* and *Laudadio* cases are "of the same kind that comprise a primary part of the business of the respondents," (Brief p. 27) petitioner has lost sight of the vital fact which distinguishes the instant case from *Ritch* and *Laudadio, i.e.,* the respondent consulting firm is *not* a firm of construction contractors.

Neither is petitioner's position strengthened by reliance on *Thomas* v. *Hempt Bros., supra,* and *Alstate Construction Co.* v. *Durkin, supra.* The *Hempt Bros.* case held the Act applicable to employees engaged in the preparation of cement mixtures for physical incorporation into roads and highways, easily distin-

guishable as commercial products from plans and specifications which are a manifestation of professional advice and conclusions. The operations in *Alstate Construction Co.*, which involved the preparation of materials primarily for use in its own road construction work, are far removed from the activities of a consulting engineering firm which prepares plans and specifications for the exclusive use of a specific client.

Notwithstanding petitioner's strong contentions to the contrary, we believe that the preparation of plans and specifications by a consulting architectural-engineering firm is too remote from the repair and improvement of instrumentalities of interstate commerce to be within the Act's coverage, and that the court below presented a correct evaluation of the entire situation when it stated: "There is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is 'commerce' under the Act." (App. A. p. 41).

Of all the cases cited by petitioner, only *Mitchell* v. *Brown Engineering Co.*, 224 F.2d 359, 8th Cir. 1955), *cert. denied*, 350 U.S. 875 (1955), factually compares with the instant case. While the Eighth Circuit in the *Brown* case concluded that non-professional employees of a consulting engineering firm were engaged "in commerce," such conclusion was influenced to a large extent, if not completely, upon the fact that Brown provided a resident engineer at the job site whose work "was a vital factor affecting the progress of the construction project." The duties of the "resident engineer" included the inspection of all incoming materials, inspection of the work as it was completed and the preparation of progress reports. These "job-

site" services provided by Brown led the Eighth Circuit to conclude that "the completion of a project depends in no small way upon the services rendered by defendant's employees," and "[t]o hold that the 'resident engineer' exercises no control over the work of the contractor and does not perform a vital function in the total activities of a construction project, is to turn away from the realities and practical considerations of the situation * * *." There is no evidence in the record that respondents in the instant case, like Brown, provide "resident engineers" at the job site.

We think that the Eighth Circuit placed undue emphasis upon the function of the resident engineer in relation to the control and completion of construction. Actually, he was only the agent of the consulting firm and did not have the authority to control the construction; but, rather, his function was to advise the consulting firm of progress, deviations and other factors relating the construction to the engineering design. The Eighth Circuit dismissed as of "minor significance" the fact that the resident engineer was employed by and under the direction and control of the consulting engineer, whereas in *Laudadio* and *Ritch* the employees in question were employees of and under the direction and control of the construction contractor. We submit that the distinction is of major significance.

Further, we suggest that the Eighth Circuit misapplied the "in commerce" test in the light of the previous decisions of this Court and the lower courts in holding that professional engineering services for completely local projects should be considered a link in the chain

leading to interstate commerce transactions, and thus equate completely local professional services to eventual "in commerce" results. It is difficult to understand the Eighth Circuit's disregard of the clear Congressional intent to exclude remote employee activity in relation, for example, to Brown's preparation of plans and specifications for an addition to a local power plant which supplies power to a railroad, which, in turn, hauls freight, in part, in interstate commerce. We thought Congress had made it clear that this type of remote and drawn-out relationship to interstate commerce would no longer be permitted as a basis for sweeping local activity under the Act.

To hold that employees of professional consulting engineering firms are engaged "in commerce" is to do violence to accepted principles laid down in a series of cases which involved employee activity comparable to that performed by respondents' employees in the instant situation. (*Collins* v. *Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229 (D.C. Pa. 1946), and *Kelly* v. *Ford, Bacon & Davis, Inc.*, 162 F.2d 555 (3d Cir. 1947)).

In *Collins*, defendant engineering company was supervising the construction of a plant in Pennsylvania. Plaintiff, an employee of defendant, prepared plans and drawings for the defendant which were sent outside of the state and were used by contractors in submitting bids for construction work at the plant. The court, granting judgment for the defendant, ruled that "the preparation of plans and the writing of letters, as a result of which persons other than the employer procure materials outside the state and ship them into Pennsylvania for use in performing their own inde-

pendent contracts, constitute neither the production of goods for commerce nor engaging in commerce within the meaning of the Fair Labor Standards Act." Applying the *Threlkeld* "in commerce" coverage test, the court continued by stating:

> It may be that the present plaintiff's employee activities, resulting in purchases and shipments by subcontractors for performance of their contracts in Pennsylvania, 'affect or indirectly relate to' interstate commerce but they are clearly not 'actually in or so closely related to the movement of the commerce as to be a part of it.'

In *Kelly,* the employee's duties were confined solely to processing extra work orders in connection with the construction of a new factory. These work orders, in reality, were "contracts for additional original construction" and as a result of the work orders equipment came from out of state to the subcontractors for use by them in their part of the construction of the plant. Concluding that plaintiff's activities were not sufficiently closely related to interstate commerce so as to bring him within the Act's coverage, the court stated that: "while plaintiff may have collaterally affected the movements of the materials and equipment we do not consider that it is within the contemplation of the Act to say that what he did bore the necessary close tie to commerce called for by the decisions."

Both in *Collins* and *Kelly* it is evident that the courts clearly recognized and gave effect to the fact that the work of the draftsmen in those situations was related to the construction efforts of third parties, rather than their own employer. Similar circumstances are present in connection with the relationship of employees of consulting engineering firms to actual construction. The

work of employees involved in the case before this Court is used by third parties as a basis and as a guide for their own construction activities. Such a situation is clearly distinguished from the cases relied on by petitioner where draftsmen prepared plans and specifications exclusively for use by their immediate employers who were engaged in the business of actual construction.

Furthermore, while plans and specifications prepared by employees of consulting engineers usually specify the types and qualities of materials to be incorporated into the various projects, they are silent regarding source of supply, leaving this determination to the individual contractor or subcontractor. Under these conditions, the employees who prepare such plans and specifications do not have that degree of close relationship to the movement of goods in interstate commerce which would justify their being included within the provisions of the Act. The Second Circuit in *Laudadio* v. *White Construction Co., supra,* (strongly relied on by petitioner) clearly pointed this out where it commented that if the items designated by the draftsmen for incorporation into the project "could have been obtained either from depots within the state or from depots outside the state so that the decision as to which source to utilize rested wholly within the discretion of the purchasing department, we do not think that the plaintiffs were 'engaged in commerce,' although in fact the goods were ordered from outside the state."

And as the Second Circuit further stated in *Laudadio,* "It is the physical immediacy of connection with actual transportation movement that determines

whether an employee's activities cause him to be 'engaged in commerce.'" We submit that the employees involved in the instant case do not have the required "physical immediancy of connection" with the interstate movement of goods so as to properly be considered as coming within the "in commerce" provisions of the Fair Labor Standards Act.[1]

B. *The interstate travel and communications of respondents' employees do not constitute an engagement in commerce within the meaning of the Fair Labor Standards Act.*

Petitioner contends that the interstate communication by telephone and correspondence, the preparation of plans, specifications and drawings mailed to clients out-of-state, and the gathering of data to be used in the preparation of plans and specifications, all by respondents' employees, constitutes an "engagement in commerce" within the meaning of the Act. Petitioner cites numerous cases to support its position that interstate communication, regardless of character, is engagement in commerce, and refers to *Mitchell* v. *Vollmer*, 349 U.S. 427 (1955), for the admonition that the statutory terms of coverage of this Act must be given a "liberal" construction. From whose point of view should "liberal" be approached: the Department of Labor or the individual architectural-engineering firms throughout the country to whom the Department would

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[1] See also *Scholl* v. *McWilliams Dredging Co.*, 169 F. 2d 729 (2d Cir. 1948) where the firm agreed to provide engineering services for the construction of certain outlying bases in Greenland and the court ruled that the preparation of plans and specifications and the transmission of them in interstate commerce for use in construction activities are not activities within the contemplation of the Act.

extend coverage contrary to the meaning and intent of Congress? We believe this query was answered by this Court in *McLeod* v. *Threlkeld, supra,* when it said: "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority."

This interpretation was reiterated, in essence, by the court below when it stated that: "the mere use of the mails and of transportation facilities across state lines is not necessarily interstate commerce. There must be some relation to a business which is interstate in character." (App. A., p. 40). "Indeed, were it otherwise, the Act would sweep into its maw every business, however local, which manufactured nothing whatever, merely because it was carried on by correspondence, which is the case with all business." (*Bozant* v. *Bank of New York, supra,* p. 789).

Petitioner relies on *United States* v. *Shubert,* 348 U.S. 222 (1955), and *United States* v. *International Boxing Club of New York,* 348 U.S. 236 (1955), in which certain activities of promotional enterprises were held to constitute trade or commerce within the meaning of the Sherman Act, to support its contention that the interstate activities of a consulting engineering firm likewise constitute trade or commerce. Such a broad extension of "trade or commerce" is untenable with respect to the independent practice of the professions in view of Justice Story's statement in *The Schooner Nymph,* 18 Fed. Cas. 506 (1834), that: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions,* it is constantly called a trade." (Emphasis added).

Nor are *Edwards* v. *California*, 314 U.S. 160 (1941), or *Caminetti* v. *United States*, 242 U.S. 470 (1917) proper authority to support the proposition advanced by petitioner that the interstate travel of respondents' fieldmen to gather data and make surveys constitutes interstate commerce. For it was in *Kelly* v. *Ford, Bacon & Davis, Inc., supra*, a case under the Fair Labor Standards Act, that the Third Circuit declared: "Decisions such as *Edwards* v. *People of State of California*, 314 U.S. 160, and *Caminetti* v. *U. S.*, 242 U.S. 470, stating the principle that transportation of persons between the states is interstate commerce have no relevancy to our query."

Mitchell v. *Kroger Co.*, 248 F.2d 935 (8th Cir. 1957) (traveling auditors of a multi-state food chain organization) and *Aetna Finance Co.* v. *Mitchell*, 247 F.2d 190 (1st Cir. 1957) (employees of a branch office of a small loan company) are not particularly germane to the instant question. More in point, because of a similarity between the type of specialized services offered to specific clients, is *Mitchell* v. *Krout & Schneider*, 150 F. Supp. 857 (D.C. Cal. 1957) where the court held that employees of an investigative agency who conduct local investigations pursuant to contracts between the agency and its clients are not engaged in commerce within the meaning of the Act, since their work, like that of respondents' employees, is essentially of a local nature. The court in *Krout & Schneider* noted as irrelevant the fact that some of the investigations were conducted by out-of-state branches of the agency, that the investigative reports made by the agency for the local offices of interstate insurance companies may be passed on by those local offices to their central offices located in other states, or that the

agency's own offices, being located in different states, transmit inter-office correspondence across state lines. The entire operations of respondents' employees are practically identical to those of the multi-office investigative agency in *Krout & Schneider,* and on the basis of that decision likewise cannot be held to be "in commerce."

That interstate travel by a firm's employees pursuant to their duties cannot amount to interstate commerce under a "liberal" construction of the Act is further evidenced by the decision in *Schaeffer* v. *Fraser-Brace Engineering Co.,* 104 F. Supp. 871 (D.C. Tenn. 1952) where it was held that an expediter employed by a construction contractor to travel around the country to speed delivery of materials was not engaged in commerce, the court concluding that "The effect of his activities on commerce was incidental to his main activity and interest."

The interstate travel of respondents' fieldmen is incidental to their primary duty to gather data for incorporation into the plans and specifications prepared by draftsmen and other employees. Fieldmen of a consulting engineering firm who travel across state lines to gather data, which forms the basis for the future exercise of professional judgment and skill, are no different in character or function from employees of leading law firms who travel across state lines to interview witnesses, check records, etc., which information forms the basis for the lawyers' future strategy and courses of action. Certainly no one would question but that the lawyer's employee was not engaged in commerce. By the same token, the contention that fieldmen of a consulting engineer are engaged in commerce is similarly without merit.

Court decisions are clear that the preparation of plans, letters, reports and other printed matter, the inter-state transportation of which is merely incidental to a firm's primary business, does not constitute an engagement in commerce. In *Kelly* v. *Ford, Bacon & Davis, Inc., supra,* the contention was made that the preparation and mailing of letters and work orders constituted interstate commerce. The court reasoned, however, that even if such letters crossed state lines, "we are satisfied from our independent examination of the evidence * * * that these were an 'incident of intrastate business.'"

Likewise in *Bozant* v. *Bank of New York, supra,* the Second Circuit noted that "the mere writing of letters or the drawing of papers, which have no value of their own except as records, are not to be counted."

And again in *Kelly* v. *Ford, Bacon & Davis, Inc., supra,* "What he [the employee] did remotely affected commerce, but the gap between the primary intrastate operation and the collateral interstate commerce feature was not bridged for any practical purposes by the processing and mailing of the orders and letters which appear in this matter."

Thus, we submit, that where an operation is primarily intrastate, as is respondents', the incidental inter-state travel of employees, the preparation and mailing of plans, specifications and correspondence and the interstate communication do not, in and of themselves, constitute an "engagement in commerce" on behalf of employees conducting such activities.

That this proposition has merit is supported by petitioner's own admission (Brief p. 40, f.n. 16) that

"correspondence and communications merely incidental to an ordinary local practice of law, medicine or other profession" is not within the Act's coverage. Consulting architectural-engineering firms, like physicians or firms of lawyers, are engaged in the ordinary local practice of a learned profession.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Fourth Circuit be affirmed.

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